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No. 86-644

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD SELTZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government, in a prosecution for making false declarations under a grant of immunity, may introduce at trial the defendant's immunized testimony at an earlier grand jury proceeding.

2. Whether the trial court, in a prosecution for making false statements in violation of 18 U.S.C. 1623, was required to submit the question of materiality to the jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 794 F.2d 1114. The opinion of the district court (Pet. App. A17-A23) is reported at 621 F. Supp. 714.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1986. A petition for rehearing was denied on August 22, 1986. The petition for a writ of certiorari was filed on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted on six counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. The first two counts were based on statements made during petitioner's grand jury appearance on May 21,

1981; the other four counts were based on statements made during petitioner's grand jury appearance on April 7, 1983. Prior to trial, the district court dismissed the first two counts, ruling that a grant of immunity to petitioner at the time of his 1983 grand jury appearance precluded the use of that grand jury testimony to indict him for perjury during his 1981 grand jury appearance (Pet. App. A18-A20). With respect to Counts three through six, however, the district court ruled that his 1981 grand jury testimony (also given under a grant of immunity) was properly used to indict petitioner for making false declarations during his 1983 grand jury appearance and that the 1981 testimony was also admissible at the false declarations trial itself (*id.* at A21-A22). Petitioner was subsequently convicted, after a jury trial, on Counts three through six. He was sentenced to an aggregate term of 18 months' imprisonment. The court of appeals affirmed (*id.* at Al-A16).

2.a. The evidence at trial revealed that on May 21, 1981, petitioner was called to testify before a federal grand jury that was investigating an alleged scheme of tax evasion and international money laundering by petitioner's former employer, Reuben Sturman. Relying on his Fifth Amendment privilege, petitioner refused to testify. After being granted immunity under 18 U.S.C. 6002, petitioner testified, inter alia, that he had never used any name other than his own in business or personal transactions and that he was unfamiliar with International Bancorpest or Merchants and Shipowners Bank. He also testified that, apart from certain conversations he had had with Sturman's lawyer, he had no part in certain wire transfers of funds from Swiss banks and/or International Bancorpest or Merchants and Shipowners Bank into accounts of two Sturman-controlled companies. Following his grand jury appearance, petitioner wrote a letter to the grand jury foreman admitting that certain portions of his grand jury testimony had not been truthful. Pet. App. A2-A3.

b. On April 7, 1983, petitioner was again called to testify before a grand jury investigating Sturman's illegal activities. When petitioner invoked his Fifth Amendment privilege and refused to testify, he was again granted immunity under 18 U.S.C. 6002. After being given an opportunity to review and clarify his prior testimony, petitioner again testified that he had never used any name other than his own for either business or personal transactions. He further testified that he did not recall signing three wire transfer orders, in names other than his own, resulting in the transfer of $197,000 from a London bank to various Sturman-related accounts. When confronted with copies of the documents containing entries in his handwriting, however, petitioner admitted initiating the transfers and signing the names appearing on the orders. Nevertheless, petitioner denied having any recollection of the source of the funds, the reasons for the transfers, or any of the events surrounding the transactions. Pet. App. A3-A4, A17.

3. In proving the four false declaration charges relating to petitioner's 1983 grand jury appearance, the government introduced evidence showing petitioner's awareness of Sturman's tax evasion and money laundering scheme. Among the items of evidence introduced by the government was petitioner's immunized 1981 testimony. That testimony was offered to demonstrate that petitioner was testifying falsely in 1983 when he said he had little or no knowledge about the wire transfers. Pet. App. A5-A6.

4. The court of appeals affirmed (Pet. App. A1-A16). Relying on this Court's decision in *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), the court held that neither the Fifth Amendment nor the immunity statute precluded the use of petitioner's immunized 1981 grand jury testimony in the prosecution for false statements made during petitioner's 1983 grand jury appearance (Pet. App. A9-A11). The court also rejected petitioner's claim that the district court

erred in refusing to submit to the jury the issue of the materiality of the false statements (*id.* at A15 -A16).

ARGUMENT

1. Petitioner's principal contention (Pet. 5-8) is that the decision of the court of appeals allowing the use of his immunized 1981 grand jury testimony conflicts with decisions of this Court and the Second Circuit. That claim is without merit.

a. It is well settled that a witness may be prosecuted for perjury or making false declarations in the course of his immunized testimony. In *United States* v. *Apfelbaum, supra*, this Court emphasized that the immunity statute "creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements." 445 U.S. at 122. The *Apfelbaum* Court held that the admission at trial of truthful, as well as false, immunized testimony in a prosecution for perjury committed during the course of the immunized testimony does not violate either the Fifth Amendment or the immunity statute. In so holding, the Court concluded that the Fifth Amendment privilege did not preclude the use of the immunized testimony during the subsequent perjury trial "because, at the time [the defendant] was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give" (*id.* at 130). Because the protection afforded by the immunity statute is only as broad as the Fifth Amendment privilege it displaces, the witness obtains no immunity with regard to an offense that the witness has not yet committed. As the Court noted (445 U.S. at 131), "a future intention to commit perjury or to make false statements * * * is not by itself sufficient to create a 'substantial and "real" ' hazard that permits invocation of the Fifth Amendment."

Relying on the reasoning of *Apfelbaum*, the court of appeals correctly ruled (Pet. App. A9-A11) that petitioner's immunized 1981 grand jury testimony was properly admitted in the prosecution for false declarations made during the 1983 grand jury appearance. Because petitioner could not have invoked the privilege in 1981 with respect to perjury to be committed in 1983, the immunity granted him in 1981 did not protect him against the use of his immunized testimony to prove that he later made false statements during his 1983 grand jury appearance.[1]

Contrary to petitioner's contention (Pet. 6-8), the decision of the court of appeals does not conflict with this Court's decisions in *New Jersey* v. *Portash*, 440 U.S. 450 (1979); *Marchetti* v. *United States*, 390 U.S. 39 (1968); and *Cameron* v. *United States*, 231 U.S. 710 (1914).

Petitioner relies on a statement in *Portash* that testimony compelled under a grant of immunity "may not be put to any testimonial use whatever against [the witness] in a criminal trial" (440 U.S. at 459). The *Apfelbaum* Court recognized, however, that that language could not be

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[1]Petitioner's argument (Pet. 10), based on the concurring opinions in *Apfelbaum*, that the decision is limited to prosecutions for false statements made during the immunized testimony itself is not persuasive. Although three Justices noted that the facts did not raise an issue concerning the permissible use of immunized testimony at a prosecution for subsequent perjury (445 U.S. at 132-135), six Justices joined in the majority opinion, and the reasoning of that opinion is fully applicable in the present case.

Moreover, the court of appeals in the present case noted its disagreement with the district court's finding that petitioner appeared before two separate grand juries on two separate occasions, although it did not resolve the issue (Pet. App. A3 n.2). To the extent that petitioner's appearances constituted a single appearance before the grand jury (since both occasions related to an investigation of Sturman's illegal activities), the point made in the concurring opinions would be inapplicable.

applied broadly or it could preclude the use of immunized testimony in perjury prosecutions (445 U.S. at 120 n.6). The *Apfelbaum* case makes clear that the statement in *Portash* was not meant to foreclose any criminal use of immunized testimony, regardless of the context. Moreover, as petitioner concedes (Pet. 7 n.3), the Court in *Portash* specifically declined to address whether immunized testimony could be used in a subsequent false declarations prosecution (440 U.S. at 459 n.9). Rather, the *Portash* Court simply held that the prosecution could not use immunized testimony to impeach the defendant at his trial for the substantive offenses about which he had testified before the grand jury. *Portash* is therefore not instructive on the issue presented here.

The decision in *Apfelbaum* likewise undermines petitioner's reliance on *Marchetti* v. *United States*, 390 U.S. 39 (1968). See 445 U.S. at 128-129. In *Marchetti*, the Court declined to apply a rigid distinction between past and future offenses in determining whether the Fifth Amendment privilege was available. It held that a professional gambler engaged in ongoing illegal conduct faced a sufficient risk of incrimination with respect to future acts to justify upholding the claim of privilege. The Court noted (390 U.S. at 54), however, that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." See also *United States* v. *Freed*, 401 U.S. 601, 611 (1971)(Brennan, J., concurring)(noting that the Fifth Amendment does not require the granting of immunity "in connection with crimes that the transferee [of firearms] might possibly commit in the future with the registered firearm"). In any event, in light of *Apfelbaum* it is clear that the risk of incrimination with respect to future acts of perjury does not fall within the holding of *Marchetti*.

Finally, petitioner's reliance on *Cameron* v. *United States*, 231 U.S. 710 (1914), is misplaced. In *Cameron*, the defendant was indicted for committing perjury in two related bankruptcy proceedings. At trial, the prosecution sought to use his testimony in one proceeding to prove that his testimony in the other proceeding was false. The Court held that such use of the testimony violated the applicable immunity statute, Rev. Stat. § 860 (1878 ed.). The Court construed that statute to permit the government to use the allegedly false statements in each proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. *Cameron*, however, did not appear to turn on an interpretation of the Fifth Amendment (see 231 U.S. at 721, 724). Moreover, it involved a statute very different from the 1970 use immunity statute at issue in this case. The statute at issue in *Cameron*, after specifying that immunized testimony could not be used in any criminal proceeding, provided that the protection did not apply to the use of the testimony in a prosecution for " 'perjury committed in * * * testifying as aforesaid' " (231 U.S. at 720 (quoting Section 860)). Thus, by its terms, Section 860 authorized the use of the testimony only in a case charging that the testimony itself was perjured; it did not authorize the use of that evidence to prove that testimony given at *another* time was false. The statute at issue here, by contrast, is not explicitly limited to perjury committed during the course of the immunized testimony. Instead, it is phrased more expansively to permit use of immunized testimony in "a prosecution for perjury [or] giving a false statement" (18 U.S.C. 6002).

Petitioner also contends (Pet. 6) that the decision of the court of appeals conflicts with a series of pre-*Apfelbaum* decisions in the Second Circuit: *United States* v. *Berardelli*, 565 F.2d 24 (1977); *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); and

United States v. *Housand*, 550 F.2d 818, cert. denied, 431 U.S. 970 (1977). Those three cases, however, were effectively overruled by *Apfelbaum*, in which the Court specifically noted (445 U.S. at 119 n.5) that, in the Second Circuit, false immunized testimony had been held admissible in a subsequent perjury prosecution, although truthful immunized testimony had not. Because the *Apfelbaum* Court concluded that truthful as well as false immunized testimony is admissible in a prosecution for a subsequent act of false swearing, the Second Circuit cases cited by petitioner are no longer good law.[2]

2. Petitioner also contends (Pet. 11-13) that the district court erred in refusing to submit to the jury the issue of the materiality of his false statements. Petitioner concedes (*id.* at 11-12) that this Court, in *Sinclair* v. *United States*, 279

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[2]Petitioner's contention (Pet. 8-10) that the court of appeals applied the wrong test for determining the application of the Fifth Amendment privilege likewise lacks merit. The *Apfelbaum* Court explicitly reaffirmed that the test for applying the Fifth Amendment privilege is " 'whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination' " (445 U.S. at 128 (citations omitted)). Applying that test, the court of appeals correctly concluded (Pet. App. A10-A11) that, at his first grand jury appearance in 1981, petitioner faced only speculative and insubstantial risks of self-incrimination from future false testimony; the 1981 immunity grant was therefore not required to protect against the use of petitioner's compelled 1981 testimony in a prosecution for giving false statements in a later proceeding.

In this regard, petitioner's reliance (Pet. 9) on *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), is misplaced. The Court in *Hoffman* explained that the scope of the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime" (*ibid.*). As the Court observed, however, this protection is confined to those instances when the witness "has reasonable cause to apprehend danger from a direct answer" (*ibid.* (citation omitted)).

U.S. 263, 298 (1929), stated that the materiality of perjured testimony is a question of law for the court, but he contends that *Sinclair* is no longer good law. We submit, however, that *Sinclair* remains good law and that the courts below properly followed it.

Sinclair involved a challenge to a conviction under 2 U.S.C. 192, which imposes a penalty on any witness before a committee of Congress who refuses to answer "any question pertinent to the question under inquiry" by the committee. The Court rejected Sinclair's claim that the question he declined to answer was not pertinent to any inquiry the committee was authorized to make (279 U.S. at 296-298). It held (*id.* at 298) that the question of pertinency had been "rightly decided by the court as one of law." The Court noted (*ibid.* (citations omitted)) that the issue was similar to that of the materiality of false testimony in a perjury prosecution, in which "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court."

This Court has not retreated from its statements in *Sinclair*. Thus, in *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962), the Court reiterated its holding in *Sinclair* that pertinency under 2 U.S.C. 192 is a question to be determined by the court as a matter of law. The rule announced in *Sinclair* is well settled and continues to be followed in all the federal courts of appeals and in most state courts. See, *e.g.*, *United States* v. *Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983) (citing cases), cert. denied, 465 U.S. 1036 (1984); *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980)(involving case brought under 18 U.S.C. 1623); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979)(same). Petitioner cites nothing in the legislative history of 18 U.S.C. 1623 to suggest that

Congress intended to abandon the traditional rule in prosecutions brought under that statute. See generally *United States* v. *Watson*, 623 F.2d at 1201 n.6.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Petitioner suggests (Pet. 11-12) that *In re Winship*, 397 U.S. 358 (1970), and its progeny have effectively overruled *Sinclair*. In *Winship*, the Court indicated that the prosecution is required to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged (*id.* at 364). As the language of *Winship* suggests, however, the "beyond a reasonable doubt" standard applies to questions of *fact*; it has no application with respect to questions of law.

Petitioner also asserts (Pet. 12) that the Court should resolve a conflict between state and federal courts concerning whether materiality is a matter of law. He relies on *Commonwealth* v. *McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), in which the Supreme Judicial Court of Massachusetts held that the element of materiality under a state perjury statute was a matter for the jury rather than for the court. *McDuffee* clearly represents the minority point of view. See *State* v. *Sands*, 123 N.H. 570, 592, 467 A.2d 202, 215-216 (1983) (noting that all federal courts follow the traditional rule and that Georgia, New York, and Massachusetts are apparently the only states to hold that materiality in a perjury case is a jury question). The *McDuffee* case, however, is not in conflict with the decision in this case, because *McDuffee* addressed the issue of materiality under a state statute, not under 18 U.S.C. 1623.